

Michael E. Toner, Esq. Corrine A. Falencki, Esq. Bryan Cave LLP 700 13<sup>th</sup> Street NW Washington, DC 20005

JAN 2 2 2009

RE: MUR 5926 - Republican Party of Minnesota

Dear Mr. Toner and Ms. Falencki:

On July 20, 2007, the Federal Election Commission notified your clients, the Republican Party of Minnesota and Anthony G. Sutton, in his official capacity as treasurer, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act"). A sopy of the complaint was forwarded to your clients at that time.

Upon further review of the allegations contained in the complaint, and information supplied by your clients, the Commission, on December 2, 2008, found that there is reason to believe that the Republican Party of Minnesota and Anthony G. Sutton, in his official capacity as treasurer, violated 2 U.S.C. § 434(b), a provision of the Act. Also on December 2, 2008, based on information ascertained by the Commission in the normal course of carrying out its supervisory responsibilities, the Commission found that there is reason to believe your clients violated 2 U.S.C. §§ 441b(a) and 441a(f) and 11 C.F.R. §§ 102.5(a) and 106.7(f), provisions of the Act and Commission regulations. See 2 U.S.C. § 437g(a)(2). The Factual and Legal Approximation which formation is for the Commission's findings, is attached for your information.

You may sabinit any factual or legal materials that you britiete are miavant to the Commission's consideration of this matter. Please submit such materials to the General Counsel's Office within 15 days of receipt of this letter. Where appropriate, statements should be submitted under oath. In the absence of additional information, the Commission may find probable cause to believe that a violation has occurred and proceed with conciliation.

If you are interested in pursuing pre-probable cause conciliation, you should so request in writing. See 11 C.F.R. § 111.18(d). Upon receipt of the request, the Office of the General Commel will make recommendations to the Commission either proposing an agreement in settlement of the matter or resummending declining that pre-probable cause conciliation be pursued. The Office of the General Counsel may recommend that pre-probable cause conciliation not be entered into at this time so that it may mamplete its inventigation of the matter.

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Further, the Commission will not entertain requests for pre-probable cause conciliation after briefle on probable cause have been mailed to the respondent.

Requests for extensions of time will not be routinely granted. Requests must be made in writing at least five days prior to the due date of the response and specific good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extansions beyond 20 days.

This matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A) unless you notify the Commission in writing that you wish the matter to be made public.

If you have any questions, please contact Kasey Morgenheim, the attorney assigned to this matter, at (202) 694-1650.

On behalf of the Commission,

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Steven T. Walther

Chairman

Enclosure
Factual and Legal Analysis

#### FEDERAL ELECTION COMMISSION

# **FACTUAL AND LEGAL ANALYSIS**

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RESPONDENTS: Republican Party of Minnesota and Anthony G. Sutton, in his official capacity as treasurer

MUR 5926

# I. <u>INTRODUCTION</u>

This matter was generated by a complaint filed with the Federal Election Commission ("the Commission") by Citizens for Responsibility and Ethics in Washington (CREW), Melanile Sloan, and Diane Genth, and by information accertained by the Commission in the normal course of carrying out its supervisory responsibilities. See 2 U.S.C. § 437g(a)(1) and (2).

# II. FACTUAL SUMMARY

The Complainants allege that the Republican Party of Minnesota ("RPM") violated several sections of the Federal Election Campaign Act of 1971, as amended ("the Act"), based on information contained in a press article in the *Minneapolis-St. Paul Star Tribune* and a confidential memorandum written by former RPM finance director Dwight Tostenson and published in the *Star Tribune*. Complaint at 3. The article reported that Tostenson drafted a memorandum to the RPM State Executive Committee on February 15, 2007 alleging that RPM understated its debts by \$100,000 or more, and significantly delayed payment of staff expense reports. Dan Browning and Pat Doyle, Internal Complaints Roil State GOP Office, Minneapolists. St. Paul Star Tribuse (June 2, 2007). The memorandum stated that beginning in May 2006, Tostenson reported to the Chairman of RPM that the committee was violating FEC laws and provided the committee Chairman with a list of suspected illegal activities. Complaint at 4.

From February 20-26, 2007, only days after Tostenson reportedly gave his memorandum to the RPM Executive Board, RPM filed amendments to 51 monthly reports that it had originally filed from 2002 through 2006.

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1 The complaint makes three allegations. Complainants allege that RPM violated 2 U.S.C. 2 § 434(b)(8) and 11 C.F.R. §§ 104.3(d), 104.11(a) and (b) by failing to disclose debts and obligations of \$100,000 or more from approximately May 2006 to at least February 2007. 3 4 Complaint at 5. Complainants further allege that RPM violated 11 C.F.R. § 116.5 by failing to 5 report unrelimbursed staff advances as contributions and outstanding debts during the same approximate time period. Complaint at 6. Finally, the complaint alleges that RPM does not 6 7 meet the threshold requirements for substantial compliance with the Act and thus should be 8 subject to a Commission audit and field investigation under 2 U.S.C. § 438(b). 9 RPM's response to the complaint does not address the merits of the allegations. Instead, 10 Respondents request that the Commission take no action with respect to the matter at this time. 11 The response explains that RPM is currently reviewing its own records for the period of time at 12 issue and has retained an outside accounting firm to assist in the process. The response also 13 states that RPM intends to file all amendments to its disclosure reports simultaneously by an 14 anticipated date of December 2007. Due to RPM's "comprehensive action on its own accord and 15 in good faith," Respondents request that the matter be held in abeyance until the review and 16 amendment precess is complyied. 17 In the Commission's initial contact with naunsel for the Respondents, counsel imicated 18 that Respondents were holding status meetings regarding the internal audit and that they had 19 completed review of two years of the committee's activity. Counsel indicated that the results of the audit would not likely be available until the end of 2007 at the earliest. In May 2008, RPM 20 21 filed amendments to 77 disclosure reports spanning the time period of 2002 through 2007. The 22 amendments disclose additional debts on each of RPM's monthly reports from May 2006

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- through February 2007. The newly disclosed debt is related to vendor payments, specifically
- 2 communications, mailing, and travel expenses.
- Additionally, it appears that RPM made an excessive transfer of over \$1.4 million of non-
- 4 federal funds for allocated administrative expenses that may have resulted in impermissible
- 5 transfers of contributions prohibited in connection with federal elections to the Committee's
- 6 federal account. RPM disclosed excessive transfers on the Committee's Anrended 2006 12-Day
- 7 Pre-General, Amended 2006 30-Day Past-General, and Amended 2006 Year-End Reposts, as
- 8 summarized in the chart below:

Report	Schedule H3 for Line 18(a): Transfers from Non- Federal Account for Allocated Activity	Schedule H4 for Line 21(a)(ii): Non-Federal Share of Allocable Administrative Expenses	Apparent Excessive Amount
2006 Amended 12- Day Pre-General Report (filed 5/21/08)	\$150,000.00	\$42,633.39	\$107,366.61
2006 Amended 30- Day Post-General Report (filed 5/21/08)	\$1,191,924.40	\$77,464.13	\$1,114,460.27
2006 Amended Year- End Report (filed 5/21/08)	\$221,211.48	\$38,901.52	\$182,309.96
Total	\$1,563,135.88	\$158,999.04	\$1,404,136.84

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The Commission's Reports Analysis Division ("RAD") sent an initial Request for

- Additional Information ("RFAI") to RPM regarding the transfers on June 6, 2007,
- 12 recommending that RPM transfer the excessive amount back to the non-federal account.
- 13 Although RAD contacted RPM multiple times from June 2007 through April 2008, RPM never
- 14 transferred the excessive amount. Instead, RPM indicated that it was in the process of a
- 15 "thorough review" of its finances. RPM's amended reports for 2002-2007 activity filed in May
- 16 2008 changed some of the figures at issue.

# III. ANALYSIS

The Commission finds reason to believe that respondents Republican Party of Minnesota and Anthony G. Sutton, in his official capacity as treasurer, violated 2 U.S.C. §§ 434(b), 441b(a), and 441a(f), and 11 C.F.R. §§ 102.5(a) and 106.7(f).

# A. Employee Retirement Accounts

Tostenson's confidential memorandum alleged that RPM misappropriated employees' retirement acceptant funds. He claimed the funds were withheld from employee payroll chanks but not immediately deposited into employee accounts. Exhibit B at 1. Tostenson alleged that as much as \$12,000 was not deposited at any one time and that some delays in payment exceeded five months. Exhibit B at 2.

In the instant matter, Respondent's failure to pay employees' retirement benefits as specified in their employment contracts appears to constitute a violation of the Act. 11 C.F.R. § 104.11(b) provides that regularly recurring administrative expenses will be treated as debt when payment is due. If a committee does not pay an employee for services rendered to the committee in accordance with an employment contract or a formal or informal agreement to do so, the unpaid amount may be truated as debt owed by the committee to the employee, or the employee cas sign a written agreement to convert his or her status to a volunteer. 11 C.F.R. § 100.74. If the unpaid amount in treated as debt, the committee must continue to report the debt in accordance with 11 C.F.R. §§ 104.3(d) and 104.11 until the debt is extinguished, until the Commission has completed a review of a debt settlement plan pursuant to 11 C.F.R. § 116.7(f), or until the employee agrees to become a volunteer, whichever occurs first. Thus, failure to report the unpaid benefits as debt without either a debt settlement plan or volunteer services agreement is a violation of 2 U.S.C. § 434(b).

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RPM's disclosure reports appear to substantiate Tostenson's allegation of delayed payments to employee retirement accounts. The committee's reports display a pattern of failing to make payments into employee retirement accounts for several months, followed by a large "catch up" disbursement. For example, from October 2005 through June 2006, RPM had zero disbursements reported to employee retirement accounts. In July 2006, RPM reported a \$12,243.46 payment to the IRA accounts. In 2006, the monthly figure normally paid to employee IRA accounts was \$1,659.56. RPM had other periods of non-payment to the IRA accounts, including several months in 2007. This pattern suggests that RPM violated 2 U.S.C. § 434(b) by failing to report unpaid employee retirement benefits as debt. Therefore, there is reason to believe RPM violated 2 U.S.C. § 434(b).

#### B. Failure to Report Debts and Delayed Payment of Staff Expense Reports

As previously noted, Complainants also allege a possible § 434(b)(8) reporting violation due to RPM's failure to report debts and obligations of \$100,000 or more. 2 U.S.C. § 434(b)(8) requires committees to disclose "the nature and amount of outstanding debts and obligations" in their reports. These debts and obligations must be continuously reported until they are extinguished. 11 C.F.R. § 104.11(a). Debts of \$500 or less must be reported no later than 60 days after the obligation is incurred, while debts of more than \$500 must be reported as of the date the obligation is incurred. 11 C.F.R. § 104.11(b).

In addition, Complainants allege a possible reporting violation if RPM significantly delayed payment of staff expense reports. The payment by an individual from his or her personal funds, including a personal credit card, for the costs incurred by or on behalf of, a candidate or political committee is a contribution unless the payment is exempted from the definition of contribution under 11 C.F.R. § 100.79. 11 C.F.R. § 116.5. Specifically, if the

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- 1 payment is not exempted under 11 C.F.R. § 100.79, it shall be considered a contribution by the
- 2 individual unless the individual is reimbursed within sixty days after the closing date of the
- 3 billing statement on which the charges first appear if the payment was made using a personal
- 4 credit card, or within thirty days after the expense was incurred if a personal credit card was not
- 5 used. 11 C.F.R. § 116.5(b)(2). A committee must treat the obligation arising from payment
- 6 described above as an outstanding debt until reimbursed (see 11 C.F.R. § 116.5(c)), and is
- 7 therefore subject to the reporting magnirements of 2 U.S.C. § 434(b).

RPM's original disclosure reports filed with the Commission for May 2006 through February 2007, the time period of the alleged violations, show that RPM disclosed only one debt, a loan from Alliance Bank that ranged in value from approximately \$130,000 to \$170,000. RPM disclosed no additional debts in the 51 amended reports it filed in February 2007. Therefore, if RPM incurred debt in excess of \$170,000 or delayed repayment of expenses incurred by its staff beyond the timeframes allowed by the regulations, it violated 2 U.S.C. § 434(b)(8) by failing to report its debts and obligations.

Notably, RPM did not deny any of the complaint's allegations in its response or to the press. However, a follow-up article in the *Minneapolis-St. Paul Star Tribune* reported that State GOP spokesman Mark Drake said that the panty is confident that it is taking ail necessary steps to comply with FEC regulations and claimed the complaint by CREW was "politically motivated." Dan Browning, Complaint Filed Qver State GOP Finances, *Minneapolis-St. Paul Star Tribune* (July 17, 2007). So, while the party stated to the press that it is taking steps to comply with Commission regulations, it has not denied the allegations. In fact, a search of the

Although a review of the 51 amendments revealed several irregularities, including shifting the reporting of employee reimbursements from the Schedule H4 (Disbursements for Allocated Federal/Nonfederal Activity) to Schedule B (Itemized Disbursements), the face of the reports do not provide the information necessary to draw any conclusion as to whether RPM failed to disclose its debts and tipligations in accordance with the Act

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- public record has also not revealed any statements from RPM intended to discredit Tostenson.<sup>2</sup>
- 2 RPM's initial response to the complaint indicated that it was conducting an internal audit and
- 3 expected to file further amendments to its disclosure reports. The Committee likely would not
- 4 invest resources to conduct a comprehensive internal audit without any indication of the
- 5 truthfulness of Tostenson's allegations. The amendments to the Committee's disclosure reports
- 6 filed in May 2008 did disclese additional debt to vendors during the time period in question.
- 7 Accordingly, there is reason to bulieve that the Republican Party of Minnesota and Anthony G.
- 8 Sutton, in his official capacity as treasurer, violated 2 U.S.C. § 434(b).

#### C. Excessive Non-Federal Transfers for Allocated Administrative Expenses

The Act prohibits the making or knowing acceptance of corporate or labor organization contributions or expenditures in connection with a federal election. 2 U.S.C. § 441b(a). Further, the Act provides that no person shall make contributions to a state party committee's federal account in any calendar year which in the aggregate exceed \$10,000, and prohibits the state committee from knowingly accepting such contributions. 2 U.S.C. § 441a(a) and (f). Under Minnesota campaign finance law, corporations are prohibited from making contributions to political parties; however, labor organizations are permitted to make such contributions. In addition, there is no contribution limit for permissible sources giving to political parties.

Minnesota Statute Chapter 10A. Section 27.

Where a committee has established both a federal and a non-federal account, "only funds subject to the limitations and prohibitions of the Act shall be deposited into such separate federal account." 11 C.F.R. § 102.5(a)(1)(i). State party committees may transfer funds from their non-

<sup>&</sup>lt;sup>2</sup> Tosts uson alleges that he was fired from his position at RPM ga February 9, 2007.

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- l federal account to their federal account solely to meet allocable expenses, such as administrative
- 2 costs that are not directly attributable to a clearly identified federal candidate. 11 C.F.R.
- 3 § 106.7(f). Under this provision, the committee must pay the entire amount of an allocable
- 4 expense from their federal account and transfer funds from their non-federal account to the
- 5 federal account solely to cover the non-federal share of that allocable expense. 11 C.F.R.
- 6 § 106.7(f)(1)(i). The committee must transfer funds from the non-federal to the federal account
- 7 to meet allneable expenses no more than 10 days before and no more than 60 days after the
- 8 payments for which they are designated are made from the federal account. 11 C.F.R.
- 9 § 106.7(f)(2)(i). Any portion of a transfer from a committee's non-federal account to its federal
- account that does not meet these timing requirements is presumed to be a loan or a contribution
- from the non-federal account to the federal account, in violation of the Act. 11 C.F.R.
- 12 § 106.7(f)(2)(ii).
- 13 It appears that RPM did not properly allocate administrative expenses between its federal
- and non-federal accounts, and that the non-federal account transfers to the federal account may
- have contained funds prohibited in connection with federal elections. See 2 U.S.C. §§ 441a(a)
- and (f) and 441b(a); Mirmesota Statute Chapter 10A, Section 27. RPM's amended reports have
- 17 actually increased the amount of the excessive transfers from the non-findenci account from over
- 18 \$1.25 million to over \$1.4 million. Because there appears to be excessive transfers regardloss of
- 19 the latest amendments, and these transfers may contain contributions prohibited in connection
- 20 with a federal election, there is reason to believe that the Republican Party of Minnesota and
- 21 Anthony G. Sutton, in his official capacity as treasurer, violated 2 U.S.C. §§ 441b(a) and 441a(f)
- 22 and 11 C.F.R. §§ 102.5(a) and 106.7(f).